IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:08.03.2006

CORAM:

THE HON'BLE MR. JUSTICE K.MOHAN RAM

W.P.No. 11695 of 2004 and

W.V.M.P.No.2367 of 2005 and

W.P.M.P.No.13760 of 2004

M/s. Kiran Machines
179 Old Mahabalipuram Road
Sholinganallur
Chennai - 600 119. ... Petitioner

-vs-

1. The Income Tax Officer Ward I(4),
121, Mahatma Gandhi Road,
Nungambakkam, Chennai 600 034.

2. The Tax Recovery Officer,
Business Range-I,
Room No.304, III Floor, New Block,
121, Mahatma Gandhi Road,
Nungambakkam, Chennai 600 034. ... Respondents

Prayer : The Writ Petition filed under Article 226 of the Constitution of India for issue of Writ of Certiorari, calling for the records of the first respondent in relation to the assessment of the petitioner for the year ending 31.3.1999, quash the assessment order dated 31.3.2003 made therein.

For Petitioner :Mr.G.Ethirajulu, Advocate
for Mr.B.Kumarasamy
For Respondents :Mrs.Pushya Sitaraman, Sr.C.G.S.C.

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O R D E R

With the consent of the counsel on both sides, the writ petition itself is taken up for final disposal.

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2. The prayer in the writ petition is to quash the assessment order dated 31.3.2003.

3. Though the impugned proceedings have been challenged on several grounds, the one ground which according to the writ petitioner is sufficient to dispose of the writ petition, is ground No.'d', which reads as follows:

> "d. The first respondent being well aware of the closure of the operations and also in possession of the residential address of the partners of the petitioner, ought to have served the notice and order on any one of the partners. However, the first respondent has adopted a curious approach in serving the mandatory notice of personal hearing on the Chartered Accountant of the petitioner and affixed the assessment order at the place of business which is not functional. The above is evidenced by the fact that the recovery notice now issued by the second respondent has been served at the residential address of the partner of the petitioner."

4. A counter affidavit has been filed by the first respondent, wherein it is stated as follows:

> "..... A final opportunity was given to the petitioner by issue of notice u/s 143(2) on 11.12.2003 posting the case for hearing on 18.12.2003 and the notice was served by affixture at the last known address of the petitioner. There was no response from the petitioner to this notice also. But the petitioner's representative in their letter dated 27.3.2003 stated that "despite our best efforts we are unable to furnish you sir, the details/ documents as required by your goodselves, since we are unable to get in touch with the above referred petitioner/partners enabling us to furnish the required information". As the assessment was getting time-barred by 31.3.2003 and despite several opportunities, the petitioner did not appear before the assessing officer, a show cause letter dated 24.3.2003 was issued duly intimating the petitioner the proposal to disallow the interest of Rs.63,61,578/- and to complete the assessment u/s 144 calling for petitioner's objections if any, on or before 28.3.2003 and this was served by affixture on 24.3.2003 at the last known address of the

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petitioner and a copy of this show cause letter was also served on the petitioner's representative on 27.3.2003."

5. The main grievance of the petitioner is that no opportunity was given to him to produce further evidence to support his claim. If the notice had been served on him personally, he would have appeared and submitted his further objections.

6. On the other hand, the learned Senior Central Government Standing Counsel for the Income Tax Department invited my attention to Section 282 of the Income Tax Act 1961, which reads as follows:

"282 (1) A notice or requisition under this Act may be served on the person therein named either by post or as if it were a summons issued by Court under the Code of Civil Procedure, 1908 (5 of 1908).

(2) Any such notice or requisition may be addressed --

(a) In the case of a firm or a Hindu undivided family, to any member of the firm or to the manager or any adult member of the family;"

The Learned Standing Counsel submitted that the first respondent by virtue of the provisions contained in section 282 of the Income Tax Act, has caused service of notice by affixture. The learned counsel also drew my attention to Order 5 Rule 20 of Civil Procedure Code, which reads as follows:

"20. Substituted Service:- (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(1A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

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Relying on the above two provisions, the learned Senior Central Standing Counsel submitted that the affixture is also one of the prescribed modes of service and as such no exception can be taken, in this case, regarding the mode of service adopted.

7. It is no doubt true that the first respondent under section 282 can invoke the provisions of Civil Procedure Code and Order 5 Rule 20 CPC provides for 'Substituted Service'. As per the said provision, before resorting to substituted service, under order 5, Rule 20, the Court should be satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, and then only the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

8. Here in this case, admittedly, the first respondent has not recorded any such satisfaction in his order before causing service of notice by affixture. It is also pertinent to point out that as per Order 5 Rule 20 (1A), the first respondent could have ordered paper publication if the address of the petitioner was not known or same could not be furnished by his representative. But, that too has not been done in this case. When an order of assessment levying tax is being passed, it is incumbent upon the first respondent to serve the notice in accordance with the above said provisions. But, in this case, that has also not been done. Thus, the principles of natural justice have been violated and on this ground, the impugned order is liable to be set aside.

9. The learned Senior Standing Counsel also fairly submits that the first respondent ought to have followed the procedure contained in Order 5 Rule 20 of Code of Civil Procedure. But, she further submits that as the first respondent is not a legally trained person, he has failed to follow the same. She further submitted that there is an alternative remedy of filing an appeal and this Court should not entertain the Writ Petition.

10. In 2003 (2) S.C.C. 107 (Harbanslal Sahnia Vs. Indian Oil Corporation Limited and Others) the Honourable Supreme Court of India held that "in an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged".

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In this case, as pointed out above, proper notice has not been served on the petitioner to enable him to effectively participate in the assessment proceedings and put forth its objections. In such circumstances, it is not proper to ask the petitioner to take recourse to alternative remedy of appeal. When the facts of this case clearly shows that there is failure of principles of natural justice and the petitioner has made out a strong case, I am of the considered view that this Court should invoke the extraordinary jurisdiction under Article 226 of the Constitution of India.

11. Finally the Learned Senior Standing Counsel for the Income Tax Department submitted that without going into the merits of the case, a direction may be issued to the first respondent to assess the assessment proceedings afresh. She further submitted that time limits may be fixed for further objections by the petitioner and for concluding assessment proceedings. Accordingly, without going into the merits of the case on the sole ground that no proper notice has been served on the petitioner before passing the impugned proceedings and there is failure of principles of natural justice, the impugned proceedings of the respondent is quashed and the writ petition is allowed.

12. The petitioner is directed to file its further objections, if any, before the first respondent, within a period of four weeks from the date of receipt of a copy of this order and on receipt of such further objections, the first respondent shall give an opportunity of hearing to the petitioner and pass orders of assessment in accordance with law and on merits as expeditiously as possible. It is to be noted that this Court has not expressed any opinion on the merits of this case and the first respondent is at liberty to pass orders without being in any way influenced by anything said in this order.

13. With the above directions, this writ petition is allowed. No costs. Consequently, connected W.V.M.P. and W.P.M.P. are ordered to be closed.

Sd/-
Asst. Registrar.

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/true copy/

Sub Asst. Registrar.

rpa/srk

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To

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2. The Tax Recovery Officer,
   Business Range-I,
   Room No.304, III Floor, New Block,
   121, Mahatma Gandhi Road,
   Nungambakkam, Chennai 600 034.

1 cc to Mr.B.Kumarasamy, Advocate, Sr. 11559
1 cc to Pushpa Sitaraman, Sr. St. Counsel for Income Tax, SR. 11543

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